

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TED M. BACH	:	DETERMINATION
A/K/A MOSHE BACHRAMOV	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law, New York City	:	
Personal Income Tax under Chapter 46, Title T	:	
of the Administrative Code of the City of New	:	
York and Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1979.	:	

Petitioner, Ted M. Bach a/k/a Moshe Bachramov, 345 East 93rd Street, Apt. #31K, New York, New York 10028, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law, New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York and unincorporated business tax under Article 23 of the Tax Law for the year 1979 (File Nos. 801421 and 801422).

A hearing was commenced before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 28, 1987 at 1:15 P.M. and continued to conclusion on July 20, 1987 at 1:15 P.M., with all briefs to be submitted by October 30, 1987. Petitioner appeared by Barry K. Honigman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner properly reported capital gain derived from the sale of his business, Alco Locksmiths & Hardware Co.

II. Whether the notices of deficiency were issued after the expiration of the period of limitations on assessment.

III. Whether the New York State Income Tax Resident Return, form IT-201, submitted by petitioner, constituted the filing of a return.

IV. Whether penalties were properly asserted.

FINDINGS OF FACT

1. Ted Bach a/k/a Moshe Bachramov (hereinafter "petitioner") submitted a 1979 New York State Income Tax Resident Return (with City of New York Personal Income Tax), form IT-201, which was received by the Department of Taxation and Finance on May 28, 1981. Said

form reported total New York income of \$5,711.00, the standard deduction and a tax balance due of \$112.44 for both New York State and New York City. One item of income reported on the form was a capital gain of \$1,640.00. According to a copy of petitioner's 1979 Federal Schedule D submitted at hearing, the aforesaid capital gain was derived from the sale of his business, Alco Locksmiths & Hardware Co. ("Alco"), and was computed as follows:

Gross sales price less expense of sale	\$75,000.00
Less cost or other basis	<u>70,900.00</u>
Balance	\$ 4,100.00
Less 60% of \$4,100.00 (capital gain deduction)	<u>2,460.00</u>
Net long-term capital gain reported	<u>\$ 1,640.00</u>

Copies of petitioner's 1979 Federal schedules C and D were not attached to his 1979 New York personal income tax return. Petitioner did not file an unincorporated business tax return for 1979.

2. The Audit Division alleged that the form IT-201 did not constitute the filing of a return because it appears that petitioner's signature may have been crossed out. The space allotted for the date of the signature contains only the number "4". Review of other signed documents contained in the record indicates that petitioner's signature on the 1979 IT-201 was not crossed out. The lines running through petitioner's signature appear to be an integral part of his signature.

3. The Special Investigations Bureau ("SIB") conducted a sales tax audit of Alco for the period March 1, 1977 through May 31, 1979 resulting in additional sales tax due of \$1,980.20, plus penalty and interest. Petitioner consented to and paid the additional sales tax, interest and penalty determined to be due.

4. According to the office report of the SIB, petitioner purchased Alco, which was located at 1448 Hylan Boulevard, Staten Island, New York, on May 27, 1976 for \$15,289.00 and subsequently sold Alco on August 15, 1979 for \$75,000.00.

5. On March 16, 1984, the Audit Division issued a Statement of Personal Income Tax Audit Changes as well as a Statement of Unincorporated Business Tax Audit Changes to petitioner wherein his reported net long-term capital gain was adjusted, based on the information provided on the SIB report, as follows:

Gross sales price less expense of sale	\$72,500.00 ¹
Less cost or other basis	<u>15,289.00</u>
Balance	\$57,211.00

¹The gross sales price of \$72,500.00 as determined by the Audit Division was based on the Notification of Sale, Transfer or Assignment in Bulk filed by the purchaser, Smile Sales Corporation.

Less 60% of \$57,211.00 (capital gain deduction)	<u>34,326.60</u>
Net long-term capital gain as adjusted	<u>\$22,884.40²</u>

6. Based on the adjustment increasing petitioner's reported long-term capital gain, the Audit Division issued two notices of deficiency as follows:

(a) The first, issued June 22, 1984, asserted unincorporated business tax for 1979 of \$2,235.00, plus penalties of \$1,173.35 and interest of \$1,070.56, for a total amount due of \$4,478.91.

(b) The second, issued July 16, 1984, asserted additional New York State personal income tax of \$3,833.00, additional New York City personal income tax of \$1,318.00, plus penalty of \$258.00 and interest of \$2,490.14, for a total amount due of \$7,899.14.

The Audit Division maintains that the second notice was timely issued within the six-year period of limitations on assessment provided under Tax Law § 683(d)(1). The penalty asserted for personal income tax purposes was for negligence pursuant to Tax Law § 685(b). The penalties asserted for unincorporated business tax purposes were pursuant to Tax Law §§ 685(a)(1), 685(a)(2) and 685(b)³ for failure to file a return, failure to pay the tax determined to be due and negligence, respectively.

7. The actual sales price, pursuant to the closing statement (which shows dates of closing as August 16, 1979 and December 5, 1979 [sic]) and according to petitioner's testimony, was \$75,000.00 and not \$72,500.00 as reported on the bulk sale report filed by the purchaser.

8. Petitioner submitted the following documentation which was not considered by the Audit Division but which petitioner claims reduces the long-term capital gain as determined by the Audit Division by either increasing his basis in Alco or reducing the sales price:

(a) Assets purchased during 1977 and 1978

(i) a sales invoice from Motorola Communications and Electronics, Inc. ("Motorola") dated April 24, 1978 in the amount of \$3,975.00 for a two-way radio system. Attached to said invoice is a copy of a Franklin Savings Bank teller check dated April 24, 1978 for \$3,975.00 payable to Motorola.

(ii) a sales invoice from Motorola dated April 13, 1978 in the amount of \$5,269.00 for a two-way radio system.

²Such amount was rounded to the nearest dollar in the computations prepared by the Audit Division. The parties did not address the issue of whether any of the gain should have been treated as ordinary as opposed to capital gain.

³Tax Law §§ 685(a)(1), 685(a)(2) and 685(b) are incorporated into Article 23 of the Tax Law by section 722(a).

(iii) a sales invoice from Standard Wholesale Hardware, Inc. dated November 1, 1977 in the amount of \$899.00 for a Medeco key cutting machine.

(iv) a sales invoice from Sweda International, Inc. ("Sweda") dated May 17, 1977 in the amount of \$966.60 for a cash register. Attached to said invoice is a copy of a Franklin Savings Bank teller check dated May 19, 1977 for \$966.60 payable to Sweda.

(v) a sales invoice from GMC Truck & Coach Division ("GMC") dated June 29, 1978 in the total amount of \$6,274.80 for a 1978 van. Attached to said invoice is a receipt from GMC indicating full payment.

(b) A bill dated December 3, 1979 indicating that petitioner paid legal fees of \$923.00 for services rendered with respect to the sale of Alco.

(c) An Assignment and Assumption of Lease indicating that petitioner assigned his security deposit of \$1,500.00 to the purchaser and that the landlord of the premises was Metal Lathers Holding Corporation.

(d) A copy of his 1979 Federal Schedule C indicating that Alco's inventory at the end of the year was \$17,000.00.

(e) An agreement dated December 5, 1979 indicating that he paid \$500.00 to the landlord to induce it to modify and extend the lease dated August 10, 1978 so as to allow said lease to be assigned.

9. It appears that the sales invoice from Motorola dated April 13, 1978 may be, at least in part, duplicative of the sales invoice of April 24, 1978. No documentation was submitted to evidence payment of said invoice.

10. No evidence was submitted to show that petitioner's 1979 reported ending inventory of \$17,000.00 was correct or that the ending inventory was not included in the items transferred on the sale of Alco to Smile Sales Corporation. The purchaser's bulk sale report indicates that inventory was a component of the sales price.

11. A schedule of assets transferred to Smile Sales Corporation by petitioner as a result of the sale of Alco establishes that the 1978 GMC van, the two-way radios and related equipment, the Sweda cash register and the Medeco key cutting machine were transferred. Petitioner's 1979 Federal Schedule C indicates that he failed to claim depreciation on the aforesaid assets purchased subsequent to his purchase of the business in May 1976.

12. As part of his brief, petitioner submitted a depreciation schedule for the aforesaid assets purchased. The depreciation method used was the straight line method. Scrap value reported appears to be arbitrarily determined. The useful life of said assets was reported as follows:

Two-way radio system	10 years
GMC van	5 years
Sweda cash register	10 years
Medeco key cutting machine	10 years

13. For the year at issue, Alco was a cash-basis taxpayer. As of November 16, 1979,

petitioner owed New York Telephone Company \$17,458.93 for advertisements listed in the telephone directory. Petitioner contended that said amount was paid during the year at issue. However, no documentation was submitted to support said contention.

SUMMARY OF PETITIONER'S POSITION

14. Petitioner claims that the purchase price of Alco in May 1976 was \$50,000.00, comprised of an actual purchase price of \$48,000.00 plus \$2,000.00 in legal fees relative to the purchase. No documentation relative to petitioner's purchase of Alco was submitted. Petitioner alleged that the contract was either misplaced or discarded by his attorney.

15. Petitioner contends that he is properly entitled to adjustments to his basis and selling price based on evidence submitted (see Finding of Fact "8", supra). He claims that such adjustments, together with an allowance of his telephone directory expense as a Schedule C deduction, reduces his omission of gross income to an amount less than 25 percent of his reported gross income. Accordingly, he claims that the three-year period of limitations on assessment applies rather than the six-year period of limitations on assessment provided under Tax Law § 683(d)(1).

16. Petitioner argues that the New York State form IT-201 he submitted constitutes the filing of a return.

17. Petitioner alleges that the penalties asserted under Tax Law §§ 685(a)(1), 685(a)(2) and 658(b) should be abated. No evidence of reasonable cause for failure to file returns and pay tax was provided.

CONCLUSIONS OF LAW

A. That the adjusted basis of the following equipment purchased by petitioner subsequent to his purchase of Alco in May 1976 is properly allowable as an increase to his basis respecting the 1979 sale at issue:

<u>Equipment</u>	<u>Cost</u>	<u>Scrap Value</u>	<u>Depreciable Balance</u>	<u>Depreciation Allowable for 1979</u>
Two-way radio	\$ 3,975.00	\$ 535.00	\$3,440.00	\$215.00
Medeco key cutting machine	899.00	212.00	687.00	43.00
Sweda cash register	967.00	167.00	800.00	50.00
GMC van	<u>6,274.00</u>	<u>1,274.00</u>	<u>5,000.00</u>	<u>625.00</u>
	<u>\$12,115.00</u>	<u>\$2,188.00</u>	<u>\$9,927.00</u>	<u>\$933.00</u>

Depreciation of above items which could have been claimed in 1977 and 1978 -- \$964.00

Adjusted basis of equipment (\$12,115.00 less depreciation of \$1,897.00) = \$10,218.00

In the above schedule, where the cost basis used was different from petitioner's schedule, scrap value was determined to be the same percentage of cost as used by petitioner. Depreciation for 1979 was determined to be 62.5 percent of the yearly allowance for depreciation based on a

transfer date of the assets of August 15, 1979.

B. That the depreciation of \$933.00 is allowable as a deduction in computing Alco's 1979 unincorporated business tax.

C. That the net long-term capital gain derived from petitioner's sale of Alco is \$18,242.00, computed as follows:

Gross sales price		\$75,000.00
Less: Expenses of sale:		
Legal fees	\$ 923.00	
Cost for modification and extension of lease so as to allow it to be assigned	500.00	
Security deposit transferred	<u>1,500.00</u>	
		<u>2,923.00</u>
Net sales price		\$72,077.00
Original basis	\$15,289.00	
Plus: Adjusted basis of acquired equipment	<u>10,218.00</u>	
Adjusted basis		<u>25,507.00</u>
Long-term capital gain		\$46,570.00
Less: 60% capital gain deduction		<u>27,942.00</u>
Net long-term capital gain		<u>\$18,628.00</u>

D. That the IT-201 submitted by petitioner constituted the filing of a return since said form reported income, deductions and a New York State and City tax liability. Said form also bore what has been determined to be the signature of petitioner.

E. That Tax Law § 683(a) provides for a three-year period of limitations on assessment. However, a six-year period of limitations on assessment is provided by Tax Law § 683(d)(1), which states as follows:

"The tax may be assessed at any time within six years after the return was filed if --

(1) an individual omits from his New York adjusted gross income...an amount properly includible therein which is in excess of twenty-five percent of the amount of New York adjusted gross income... stated in the return".

F. That Tax Law § 683(c)(1) provides that:

"The tax may be assessed at any time if --
(A) no return is filed".

G. That, as indicated in Finding of Fact "13", supra, petitioner has failed to substantiate payment of Alco's telephone directory expense for the year at issue. Moreover, the net long-term capital gain alone exceeds 25 percent of the \$5,711.00 New York adjusted gross income reported. It is therefore determined that petitioner omitted from his New York adjusted gross

income an amount properly includible therein which was in excess of 25 percent of the amount of New York adjusted gross income stated in the return, and Tax Law § 683(d)(1) applies. Since the Notice of Deficiency issued with respect to personal income taxes was issued within six years after the return was filed, said notice was timely issued.

H. That since petitioner failed to file a 1979 unincorporated business tax return, the tax may be assessed at any time. Accordingly, the Notice of Deficiency issued with respect to unincorporated business tax was timely issued pursuant to Tax Law § 683(c)(1)(A).

I. That petitioner failed to establish that his failure to file a 1979 unincorporated business tax return or pay the tax determined to be due thereon was due to reasonable cause and not willful neglect and, therefore, the penalties asserted under Tax Law §§ 685(a)(1) and 685(a)(2) must be sustained. Furthermore, since petitioner failed to show that the deficiencies asserted were not due to negligence, the penalties asserted under Tax Law § 685(b) are sustained.

J. That the petition of Ted M. Bach a/k/a Moshe Bachramov is granted to the extent provided in Conclusions of Law "A", "B", "C" and "D", supra; that the Audit Division is directed to modify the notices of deficiency issued June 22, 1984 and July 16, 1984 accordingly; and that, except as so granted, said petition is in all other respects denied.

DATED: Albany, New York
May 12, 1988

/s/
ADMINISTRATIVE LAW JUDGE